IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-9641

RICHARD'S LUMBER AND SUPPLY COMPANY, individually, and RICHARD'S LUMBER AND SUPPLY COMPANY, as Representatives of a Class,

Petitioners,

vs.

KAUFMAN AND BROAD HOMES, INC., and KAUFMAN AND BROAD HOME SALES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

As of January 6, 1977, no part of the opinion has been published in the Federal Reporter. The opinions are appended to this Petition, in Appendix A and Appendix B.

JURISDICTION

The judgment sought to be reviewed is the denial of plaintiff's Petition for Rehearing. The United States Court of Appeals for the Seventh Circuit entered an order September 20, 1976, affirming the orders of the trial court. Plaintiff filed a Petition for Rehearing. The order denying plaintiff's Petition for Rehearing was entered October 14, 1976. There was no subsequent order entered. No extension of time within which to file the Petition for Certiorari has been requested.

Jurisdiction of this court is invoked under 28 USC 2101(c) whereby review is sought of a judgment in a civil action, by writ of certiorari filed within 90 days of the entry of the order on October 14, 1976, denying the Petition for Rehearing.

QUESTION PRESENTED

Does the plaintiff's complaint state a claim for relief for violation of the antitrust laws, under the Sherman Act, 15 USC 1?

STATUTES INVOLVED

15 USC 1 (Sherman Act):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 [15 USCS § 45]: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal

shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Rule 8(a), Federal Rules of Civil Procedure

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

STATEMENT OF FACTS

A. PLEADINGS

The Seventh Circuit held that the First Claim for Relief in plaintiff's Second Amended Complaint at Law failed to state a claim upon which relief could be granted. The claim purported to allege a violation of the antitrust laws and in particular of Section 1 of the Sherman Act and sought treble damages pursuant to the Clayton Act, 15 USC, Section 15. The allegations of that claim in the pleadings, in condensed form, follow. Page references regarding the complaint are to pages reproduced in Appendix C, wherein the entire pleading is reproduced.

Two Illinois corporations, Kaufman & Broad Homes, Inc., and Kaufman & Broad Home Sales, Inc., are subsidiaries of the parent corporation known as Kaufman & Board, Inc., headquartered in California, and the subsidiaries construct and sell residential housing units in Illinois (19a). During the years in question, there existed a conspiracy or arrangement between Kaufman & Broad, Inc., and United States Gypsum Company, (20a) which the Illinois subsidiaries were a part of and which the subsidiaries aided, abetted and rendered practical (21a).

For the sake of brevity, Kaufman & Broad, Inc., will hereinafter be referred to as "K&B, Inc."; United States Gypsum Company will be referred to as "USG" and the two defendant corporations will be referred to as the "K&B subsidiaries".

The plaintiff operated a lumber yard in Harvey, Illinois. Plaintiff purchased gypsum wallboard from USG and resold it to subcontractors who installed it in housing units being constructed in Illinois locations by the

K&B subsidiaries (21a). The K&B subsidiaries had virtually all of the construction work done by subcontractors. Thus, the K&B subsidiaries were almost never a direct purchaser of gypsum wallboard (20a). Instead, plaintiff sold to a subcontractor installer of gypsum wallboard, who was paid a lump sum to include labor, materials and profit (20a). The volume of purchases of USG wallboard installed in the housing units of the K&B subsidiaries was kept track of by the sales force of USG and cross-checked by supervisory personnel of K&B, Inc., or of the K&B subsidiaries (21a).

USG then paid to K&B, Inc., a "corporate discount" based upon a percentage of the selling price of the gypsum wallboard to the supplier, such as the plaintiff (21a).

To recapitulate: USG sells to plaintiff who re-sells to a contractor-installer of wallboard. The installer is paid a lump sum for all work and materials by the K&B subsidiaries. The volume of USG wallboard installed is reported to USG and verified, then USG pays the "corporate discount" to K&B, Inc. The discount is based on the price from USG to plaintiff.

After receiving the discount, K&B, Inc., itself benefitted from these sums of money and in addition allocated various amounts of the discount among its corporate subsidiaries. This allocation was accomplished not by physical transfer of checks or bank drafts, but rather by means of compensating book entries in the account books of the subsidiary corporations (25a).

The purpose of the "corporate discount" was to encourage plaintiff to specify USG wallboard and also had the direct practical effect of rendering it impossible for plaintiff to do otherwise than supply USG wallboard so long as plaintiff wanted to sell wallboard to subcontractors installing wallboard in housing units being constructed by K&B or the K&B subsidiaries (25a).

Gypsum wallboard is a homogeneous product in that a sheet of USG wallboard is substantially the same as a sheet from another manufacturer. The wallboard sheets of different manufacturers may even be interchanged. The principal distinguishing characteristic among sheets of wallboard made by different manufacturers is price (24a). Plaintiff was injured because plaintiff could have sold non-USG wallboard to gypsum installers on jobsites of K&B subsidiaries at a lower price than USG wallboard, but was prevented from doing so by the arrangement between USG and K&B, Inc., to which the K&B subsidiaries were party. The conspiracy, which compelled plaintiff to sell only USG wallboard, was in effect during the period of time plaintiff was dealing with subcontractors employed by the K&B subsidiaries (22a). The only time it was not in effect was when distribution of USG wallboard was so far behind schedule that plaintiff was allowed to supply a substitute brand of wallboard from a different manufacturer (22a).

The "corporate discount" was not made available by USG to all purchasers of gypsum wallboard or even to a majority of volume purchasers. The discount was made available to K&B, Inc., who was not even a purchaser of wallboard, on a basis so secret that even the central regional sales manager of USG, headquartered in the Chicago area, was not told of it. All of this was part of the scheme of price fixing as alleged (26a).

As a means of cementing the relationship between USG and K&B, Inc., USG made possible and guaranteed repayment of at least one $200,000 loan to K&B, Inc., at the Northern Trust Company of Chicago, and in addition USG maintained "compensating balances" at at least two banking institutions. The K&B subsidiaries benefitted by reason of the compensating balances and loan guarantee. The balances and loan

were part of the pattern of price fixing as between K&B, Inc., and USG and provided further incentive to K&B, Inc., to further the conspiracy and agreement (20a, 25a).

The agreement and conspiracy between USG and K&B, Inc., participated in by the K&B subsidiaries was undertaken as part of a combination or conspiracy to knowingly fix, control, raise and stabilize the price of gypsum wallboard in interstate commerce, to restrain trade in interstate commerce, and to preclude plaintiff and other dealers from marketing and distributing gypsum wallboard, and constituted price fixing in violation of 15 USG Section 1 (23a).

Plaintiff and other dealers in gypsum wallboard had an interest in maintaining a free and unhampered market in gypsum wallboard from manufacturers thereof. The conduct and trade of plaintiff in his business depended upon his ability to purchase wallboard for sale at a fair market price (23a). Plaintiff, in selling the wallboard to contractors installing it in homes being constructed by K&B, Inc., and the K&B subsidiaries, sustained a direct impairment of his pricing ability and independence because of the requirement that he be compelled to furnish USG wallboard, and since he could have purchased non-USG but otherwise identical wallboard, but was prevented from doing so by the conspiracy or agreement and was forced to purchase and resell the USG wallboard at higher prices fixed by the agreement and conspiracy (25a), these prices, being artificially and unreasonably high and fixed by the conspiracy caused damage to plaintiff to the extent of at least $20,000 based upon purchases of at least $80,000 in USG wallboard and resold to contractors employed by K&B, Inc., and the K&B subsidiaries (24a).

USG is the largest manufacturer of gypsum wallboard in the United States, and K&B, Inc., is the largest builder of onsite residential housing units on a nationwide basis (23a).

Plaintiff also made the appropriate allegations of interstate commerce (23a, para 8) and alleged that plaintiff first had knowledge that USG, K&B, Inc., and the K&B subsidiaries were engaging in a special arrangement of any kind was during the year 1971, and the defendants actively and fraudulently concealed their activities, including the "corporate discount", compensating bank balances and the $200,000 loan guarantee prior to and even after 1971. Plaintiff further alleged on information and belief that the "corporate discount" is still in effect on the premise that it is not in violation of the antitrust laws (26a).

B. PROCEDURE

United States Gypsum Company was a defendant in the trial court and in the appeal to the Seventh Circuit and is not made a party to this Petition for Writ of Certiorari. USG had claimed that a settlement of certain class actions filed in a federal court in California had the effect of imposing a covenant not to sue upon plaintiff in this litigation. The Seventh Circuit agreed. That portion of the court's opinion reproduced in Appendix A and designated by the court as Part III (pages 12a through 15a) relate only to the USG issue and are totally irrelevant to this Petition for Writ of Certiorari. Plaintiff has filed with the Clerk the appropriate notice pursuant to Supreme Court Rule 21(4).

Kaufman & Broad, Inc., was a defendant in the trial court and in the appeal to the Seventh Circuit and is not made a party to this Petition for Writ of Certiorari.

K&B, Inc., was dismissed for lack of proper venue. The Seventh Circuit affirmed and Part II of the court's opinion (pages 8a through 12a) relate only to the venue issue and is irrelevant to any issue in this Petition. During the pendency of the appeal, a separate identical action was filed against K&B, Inc., in the United States District Court for the Southern District of California, docket number 76-1443 RJK. No Rule 21(4) notice has been filed with the Clerk of this Court as to K&B, Inc., for the reason that although plaintiff does not wish to contest the venue issue in this Petition, it cannot be accurately stated that K&B, Inc., has no interest in the litigation. Any decision on this Petition could certainly have an effect, by way of *res judicata*, on the identical claim asserted in California against K&B, Inc. Nevertheless, even though the Rule 21(4) Notice was not filed as to K&B, Inc., it was deemed inappropriate to make K&B, Inc., a party to this Petition for Writ of Certiorari.

It should also be pointed out that the Second Claim in the Second Amended Complaint at Law is not an issue in this Petition.

* * * * *

For purposes of this Petition, the relevant portions of the Seventh Circuit opinion are pages 1a through 8a, 15a and 16a of the order of September 20, 1976, and all three pages of the order of October 14, 1976.

ARGUMENT

I.

THE COURT OF APPEALS MISCONSTRUED THE COMPLAINT AND THE LAW IN HOLDING THAT THE COMPLAINT FAILED TO STATE A SHERMAN ACT VIOLATION.

The Seventh Circuit's holding has two distinct aspects. First, the court seems to flatly hold that the "corporate discount" scheme is definitely not price fixing. Secondly, the court holds that not enough facts, as opposed to "characterizations" were stated with respect to the question whether or how the pricing independence of plaintiff was directly impaired. The second issue is treated in the latter portion of this Petition. This portion of the Petition shall deal with the court's judgment that no price fixing agreement was shown by the allegations.

The Seventh Circuit held there was no vertical price fixing and cited only three decisions in support: *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869 (1968); *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, *aff'd* 405 F.2d 319 (2nd Cir. 1968); *Knuth v. Erie-Crawford Dairy Cooperative Ass'n*, 326 F. Supp. 48, *aff'd* 463 F.2d 470 (3rd Cir. 1972).

The essence of the court's reasoning is summed up as follows in the order after the Petition for Rehearing:

> * * * In short, fairly read, plaintiff's complaint alleges a rebate agreement between K & B and USG which had the effect of allowing USG to charge higher prices because of the incentive it gave K & B for specifying USG wallboard and that the economic effect of the agreement was that plaintiff had to pay more and charge more for the wallboard it handled. This does not amount to a price-fixing agreement.

Why not price fixing? If not price fixing, is a restraint of trade alleged? The Seventh Circuit chose not to provide any real explanation. Indeed, the precedent cited by the court provides no explanation. The basics are incontroverted: there was an agreement which allowed USG to charge higher prices so that plaintiff had to "pay more and charge more" for the USG wallboard it handled. Prices *were* affected.

The differences between the "corporate discount" scheme here presented and the rebate arrangements in *Checker Motors Corp. v. Chrysler Corp., supra*, are quite substantial. In *Checker*, the defendant instituted a "rebate" of $183 for each Chrysler taxicab, to be paid by the defendant manufacturer to each taxicab purchaser. The plan was openly advertised by dealers, and there was no evidence that the plan was not equally available to all Chrysler dealers and to all Chrysler taxicab purchasers. Each dealer was free to raise prices by the entire $183 or any lesser sum if he so desired. Although it appeared that the individual dealer had less flexibility in pricing than if Chrysler had simply lowered its wholesale price to the dealer by $183 per taxicab, the court felt this was a factor of no real account. The court held, at 405 F.2d 319, 323:

> "All that is required by Section 1 [of the Sherman Act] for the discount device employed by Chrysler to be valid is that the pricing independence of the individual dealer remain unimpeded."

In contrast to the Chrysler rebate plan, the USG/K&B, Inc., "corporate discount" was alleged to be:

(1) absolutely secret, as opposed to openly advertised pricing;
(2) unavailable to all purchasers of gypsum wallboard or even to a majority of volume purchasers of wallboard;

(3) effectuated by a cash rebate and other valuable consideration in money's worth being paid by USG to commercial entities which were *not* purchasers of wallboard;
(4) applicable to a commodity essentially homogeneous in nature, such that the only difference among brands of gypsum wallboard is price as opposed to individualized brand quality or features.

Plaintiff submits that these aspects of the "corporate discount" are so far a departure from any previously approved rebate agreement in federal precedent, that no such precedent is directly in point.

The other cases cited by the Seventh Circuit also do not approximate the factual situation here presented, although the *Knuth* case comes closer than any.

In *Knuth*, the district court wrote its opinion after a jury trial had taken place and the court had granted a motion to dismiss based on the alleged Sherman Act violations. The jury then returned a verdict against the defendants based on a theory of conversion. Prior to trial there had been an appellate decision reported at 395 F.2d 420 (3rd Cir. 1968) holding that plaintiff's complaint stated a claim under the Sherman Act.

The facts in *Knuth* proved at trial showed that the defendants were a Pennsylvania dairy Co-op, its individual directors and a number of dairies or dealers to whom the Co-op sold milk. Plaintiff, purporting to represent a class, was a milk producer and sold milk to the Co-op on consignment. The Co-op then resold it to various dairies. According to the Co-op agreement, each producer who consigned his milk to the Co-op received the same adjusted price for his milk regardless of the dairies to whom sales were made, even if at varying prices. In Pennsylvania at the time, the price of milk

was subject to strict state controls and free and open competition did not exist. The state commission had mandated higher prices for Pennsylvania milk than for milk then available in an oversupply situation in Ohio and New York. So, Pennsylvania dairies could have purchased milk from producers in the neighboring states at lower prices than the milk produced in Pennsylvania. Also, the commission had set minimum prices at which the Co-op could sell to the dairies. To protect itself from the "foreign" milk, the Co-op adopted a system of "price adjustments" or "rebates". When the Pennsylvania dairies bought from the Co-op, the dairy paid the full price set by the commission, then the Co-op sent back a money rebate to the dairy. Only those dairies complaining of lower prices from out of state producers were given preferential treatment by way of Co-op rebates. The rebates were not uniform and the Co-op did not tell any of its dairy customers of the rebates. Even those customers who received rebates were not informed they were being given a preference. The rebates totalled about $1.5 million which was the amount of damages claimed by plaintiff class representative.

In its opinion explaining why the Sherman Act claim was dismissed at the close of plaintiff's evidence, several points were made by the district court. The action of the Co-op was characterized as protective rather than predatory. The plaintiff was not a competitor of either the Co-op or the Co-op's dairy-customers. Since the Co-op was the plaintiff's agent in selling milk, and since the milk could not be marketed at the time without the rebates, it was not plaintiff who was damaged but the out of state producers, if anyone, and plaintiff did not fall within such group. And, reducing prices to meet competition was held not actionable of itself.

Although the Sherman Act claim was dismissed, the plaintiff recovered full damages from the class on the conversion theory. The opinion does not expressly say so, but full damages would appear to be the full $1.5 million.

The decision was appealed to the Third Circuit again, and the judgment of the district court was affirmed (463 F.2d 470). Dismissal of the antitrust claim was approved and commented upon. Since the dairy-customers of the Co-op were defendants in the cause, the court observed that as to them there was no evidence that any of the dairies acted in concert with anyone. Each dairy was separately dealt with, and the Co-op did not attempt to impose resale prices on any dairy. No dairy agreed to any vertical price fixing arrangement. Each dairy resold its milk at prices fixed by the state commission. Plaintiffs could not prove injury because the evidence proved that the net economic effect of the rebates was that the Co-op received more money for its member's milk than had the official, "legal" commission price been adhered to. In summary, neither a combination nor an injury was proven.

Analyzing *Knuth*, the major point is that the complaint itself was not subject to dismissal, even though plaintiff later failed to prove up an antitrust violation. The glaring difference between *Knuth* and *Richard's Lumber* is that Richard's got no rebate and did not know that part of the price which he paid was being refunded to somebody else.

The final decision cited by the Seventh Circuit in its opinion was *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869 (1968). It is hard to perceive this decision as being unfavorable to the plaintiff. Reviewing a matter in which the Eighth Circuit had found defendant's conduct wholly unilateral with no restraint of trade, the

Supreme Court held: (1) there was a combination to force plaintiff to conform to suggested resale prices; and (2) a combination to fix maximum prices for resale of defendant's newspaper constitutes a *per se* restraint of trade under the Sherman Act, Section 1.

The facts in *Albrecht* were determined in a full trial. Plaintiff, an independent newspaper distributor, purchased a home delivery route for defendant's newspaper. Defendant had "suggested" a maximum price for each paper and reserved the right to compete with plaintiff if plaintiff charged more than the suggested price. After plaintiff began charging his customers more than the maximum suggested price, defendant hired a circulation company to solicit customers away from plaintiff's route, upon the understanding that if plaintiff returned to conformance with the suggested price, the customers would have to be returned to plaintiff. And, defendant told the plaintiff he could have the weaned-away customers back if he so conformed.

Albrecht stands for the principle that resale price done by agreement or combination is a *per se* violation. In *Richard's Lumber* there is an allegation that the "corporate discount" was an agreement, not purely unilateral, and that the agreement resulted in artificially higher prices. How *Albrecht* buttresses dismissal of the plaintiff's complaint is a mystery.

Aside from the economic effect on plaintiff, the "corporate discount" is either a predatory attempt to control and stabilize prices for USG wallboard or else it is a harmless, unobjectionable rebate plan. Plaintiff's position is that it is predatory in nature. Ordinarily, this is a question the answer to which must come from a jury. As this court recently observed in *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 89 S.Ct. 1391 (1969):

> * * * As we have cautioned before, 'summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot'. * * * *

The court in *Norfolk* also pointed out that before a district court can grant Summary Judgment the facts shown of record must "necessarily dispel" the inference which could be drawn by a jury that the arrangement is predatory.

The Seventh Circuit in its opinion prior to rehearing said that the plaintiff did not allege ". . . that USG and the other defendants sought to influence the retail price of the commodity. . . ." After rehearing, the court's opinion spoke of a failure to allege ". . . that the conspiracy called for the fixing of wholesale and retail prices". These quoted portions appear to suggest that the agreement must influence *both* wholesale and retail prices of wallboard. Plaintiff is a wholesaler and the contractor-installers plaintiff sold to are not really retailers as such; probably the K&B subsidiaries, which sell the finished house to the consumer home-buyer, are properly regarded as the retailers here. Thus, although a vertical price arrangement is shown, it is not clear nor is it alleged that a higher price percolates through to the "retail" level as a result of the "corporate discount". If the Seventh Circuit's opinion is read to require that the discount must affect retail prices and not only wholesale prices, this must be viewed as incorrect. The situation presented is markedly similar to that in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224 (1968). One of the leading treatises, *Stickells, Federal Control of Business—Antitrust Laws* (Lawyers Coop. Publ. Co. 1972) has commented on the case as follows, in Section 201 of the treatise:

Prior to Hanover Shoe, Inc. v. United Shoe Machinery Corp. there was a conflict in the decisions as to the right of the defendant to raise as a defense the passing on of the damages. The Supreme Court held in the Hanover Case that passing on of damages could not be asserted as a defense, although there might be some instances where it would be permissible. Examples of permissible areas of defense would be where an overcharged buyer had a pre-existing "cost-plus" contract or "where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge." In the Hanover case the district court found that Hanover Shoe would have bought rather than leased machinery from United Shoe had it been given the opportunity to do so, and had the machines been, sold rather than leased, the cost to Hanover Shoe would have been less than the rental. The difference in cost, trebled, was the judgment awarded to Hanover Shoe. United Shoe contended that Hanover suffered no legally cognizable injury as the overcharge was passed on, in the pricing of shoes, and had it bought the machines it would have charged less making no more profit. The Supreme Court in holding that United Shoe was not entitled to assert the passing on defense noted that at whatever price the buyer sells, the price he pays the seller remains illegally high and his profits would be greater were his cost lower. If the buyer does nothing and absorbs the loss, of course, it is obvious, said the Court, that he is entitled to that as the trebled damages. On the other hand if he takes other steps to increase his volume or reduce his cost his right of damages is not changed. Finally if he raises the price for his own product "as long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows" The Court also noted that if the buyers were subject to a passing-on defense then those who bought from the buyers, for example the retailers, would have to meet the challenge that they had passed on the

higher prices to the consumer. In the Hanover case the consumers would be the buyers of single pairs of shoes. The Court pointed out that there was little likelihood that the consumer would bring an action, for his interest was too small.

The case at bar is similar because plaintiff has alleged that he could have supplied his customers, the contractor-installers on jobs of K&B subsidiaries, with a different brand of otherwise homogeneous wallboard at a lower price but was prevented from doing so by the conspiracy, and that plaintiff sustained an impairment of his pricing abilities, to plaintiff's financial detriment. Plaintiff's complaint did not precisely set forth why or how he could sustain or suffer money damages by purchasing and reselling at an artificially high price. Nevertheless, the *Hanover Shoe* decision certainly explains how an intermediate seller in the distributive chain can incur less profit (and therefore, damage) without the shoe consumer paying a higher retail price, necessarily.

Plaintiff alleged that the arrangement as among the defendants, their corporate parent, and USG was undertaken to fix, control, raise and stabilize the price of, and restrain trade in, gypsum wallboard and constituted price fixing (para. 10). Price fixing is a broadly inclusive term. Long ago, in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811 (1940), the Supreme Court gave the term an expansive definition:

> ". . . Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces."

More recently, the Supreme Court has repeatedly announced that price fixing can result from conduct which at first glance seems rather innocuous. *United States v. Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 510 (1969) held, for example, that even exchanges of information on prices among manufacturers dominant in a single industry is a prohibited price fixing agreement under Section 1 of the Sherman Act.

For the Seventh Circuit to hold tht there was no price fixing alleged in the complaint is tantamount to its disregarding most of the antitrust precedent so painfully built up over the last decade.

II.

THE COURT OF APPEALS ENGAGED IN A SUBSTANTIAL DEVIATION FROM THE PLEADING RULES INTERPRETING RULE 8(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Seventh Circuit in this decision has decreed requirements of specificity in the drafting of a complaint in a private antitrust action which are unwarranted under federal pleading requirements as stated by the Supreme Court. In addition, the court has refused to accept that the essential allegations of the complaint are in fact true. In so doing, the court has reverted to the very thing which in 1957 the Supreme Court told the Seventh Circuit not to do. In *Radovich v. National Football League*, 353 U.S. 445, 77 S.Ct. 390 (1957), this court stated:

> "Petitioner's claim need only be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade" [citation] and meet the requirements that petitioner has thereby suffered injury. * * * In the face of such a policy this court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

In that case the Seventh Circuit had reviewed a complaint which went into massive factual detail of what acts and omissions had occurred, and alleged the ultimate facts of violation of the antitrust laws and resulting damage to plaintiff. The Seventh Circuit found fault with the complaint, though, and stated (at 231 F.2d 623, 625):

> As said in Feddersen Motors v. Ward, 10 Cir., 180 F.2d 519, at page 522, "A general allegation * * * is not enough. While detail is not necessary, it is essential that the complaint allege facts from which it can be determined as a matter of law that by reason of intent, tendency or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

The Supreme Court's decision in *Radovich* came the same year as its decision in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957) which has become the landmark case setting forth the essence of pleading in federal practice. In *Conley* the basic rule was stated as follows:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint shoud not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In response to the contention in *Conley* that the complaint failed to set forth specific facts to support general allegations made therein, the court said, at 355 U.S. 48:

> "The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will

give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice', we have no doubt that petitioner's complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

The same year the Supreme Court handed down its opinion in *Radovich*, the Second Circuit had occasion to make telling comment on the subject of summary dismissals of complaints in antitrust cases. In *Nagler v. Admiral Corp.*, 248 F.2d 319 (2nd Cir. 1957) the court remarked at 248 F.2d at 322:

> It is true that antitrust litigation may be of wide scope and without a central point of attack, so that defense must be diffuse, prolonged, and costly. So many defense lawyers have strongly advocated more particularized pleadings in this area of litigation; and recently the judges in the court below have treated it as accepted law that some special pleading—the extent is left unclear—is required in antitrust cases. But it is quite clear that the federal rules contain no special exceptions for antitrust cases. When the rules were adopted there was considerable pressure for separate provisions in patent, copyright, and other allegedly special types of litigation. Such arguments did not prevail; instead there was adopted a uniform system for all cases—one which nevertheless allows some discretion to the trial judge to require fuller disclosure in a particular case by more definite statement, F.R. 12(e), discovery and summary judgment, F.R. 26-35, 56, and pre-trial conference, F.R. 16.

The court went on to quote with approval from the report of the Advisory Committee on the federal rules, with respect to Rule 8(a): (248 F.2d at 324)

> * * * "The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. * * * It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets forth the characteristics of good pleading; does away with the confusion resulting fromthe use of 'facts' and 'cause of action'; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants belief and is entitled to it."

After *Radovich*, the state of the law on antitrust pleading appeared to have been clarified once and for all: a complaint would not be dismissed unless it furnished 'no clue' as to the conduct of defendant claimed to constitute the illegal combination or conspiracy, *Klebanow v. New York Produce Exchange*, 344 F.2d 294 (2nd Cir. 1965), or unless it showed on its face and beyond any doubt that there was an insuperable bar to relief. *Bodine Produce, Inc. v. United Farm Workers Org. Committee*, 494 F.2d 541 (9th Cir. 1974).

The idea that antitrust pleadings should feature greater specificity than ordinary civil pleadings ". . . has been so thoroughly discredited that the citations could fill many pages of these reports, all at great expense and all for no real reason." *Gretener, A.G. v.*

Dyson-Kissner Corp., 298 F. Supp. 350 (SDNY 1969). See also *Niagara of Buffalo, Inc. v. Niagara Mfg. & Dist. Corp.*, 262 F.2d 106 (2nd Cir. 1968); *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881 (10th Cir. 1957). In antitrust cases, it is not necessary to set out in detail the acts complained of or the circumstances from which the pleader draws his conclusions that violations of antitrust statutes occurred. *Louisiana Farmers Protective Union, Inc. v. Great Atlantic & Pacific Tea Co.*, 131 F.2d 419 (8th Cir. 1942); *Package Closure Corp. v. Sealright Co., Inc.*, 142 F.2d 972 (2nd Cir. 1944).

In approving dismissal of the plaintiff's claim for relief, the Seventh Circuit set a much higher standard of specificity than the accepted rules require, by holding that plaintiff has pleaded characterizations of fact and not the facts themselves. In this regard, the court commented in particular on plaintiff's paragraph 17 which alleged that plaintiff ". . . was forced to *purchase and resell* the U. S. Gypsum wallboard at higher prices which were fixed by the aforesaid agreement and conspiracy." (Emphasis added). The Seventh Circuit observed that the quoted language ". . . was merely plaintiff's characterization of the rebate agreement described in the specific allegations and the effect of the agreement and not an allegation that the conspiracy called for the fixing of wholesale and retail prices." (page 2). A sentence or so later the court says: "Nor do those allegations state that the conspiracy dealt in any way with the resale prices plaintiff set." In other words, plaintiff alleged that he was forced to purchase and *resell* the wallboard at higher prices fixed *by* the agreement and conspiracy, but the court does not construe this as saying that the conspiracy *called for* fixing of wholesale or retail prices or that the conspiracy ". . . dealt in any way with the resale prices plaintiff

set." Where, in the name of heaven, lies the difference? The hypertechnicalities of Seventh Circuit pleading requirements are not easily sen.

It is plain from all this that the Seventh Circuit could not figure out exactly *how* the "corporate discount" arrangement could affect the price at which plaintiff bought and then resold the gypsum wallboard in order to result in less profitability to plaintiff. But there is little doubt, is there, that the plaintiff did allege that plaintiff's prices were so affected? And, that he was damaged? One of the most remarkable statements in the Seventh Circuit's opinion is that the conspiracy could not have affected plaintiff's resale prices "without plaintiff's knowledge" (page 2)—even though plaintiff made an express allegation to the contrary! As a matter of fact, the plaintiff did attempt to briefly explain how and why he sustained damages. It was stated that wallboard is basically fungible in nature, with one brand easily able to be substituted for another, price being the principal distinguishing factor. The "corporate discount" arrangement resulted in the USG wallboard being more expensive than a competing brand which plaintiff could have bought for less. At the same time the discount scheme made it impossible for plaintiff to sell a different brand to the contractor-installers working on the K&B projects, so long as plaintiff wanted to sell any wallboard to those contractors for the K&B jobs.

For a plaintiff to allege that defendant "negligently drove a motor vehicle against plaintiff" is a characterization. But it is a characterization firmly entrenched in federal pleading (See Appendix of Forms, Form 9, Federal Rules of Civil Procedure). It is a characterization in the nature of an allegation of ultimate fact. Federal pleading rules deem it unnecessary for a plaintiff to explain in what precise manner the defen-

dant was deficient in operating his auto or to detail the facts of the accident. In the complaint, mind you.

The Seventh Circuit in its preliminary opinion plainly held that no claim for "vertical" price fixing was stated and observed:

> "The essence of such a claim is impairment of the dealer's independence in setting a resale price for the goods in question." (Page 19)

In its further opinion after rehearing, the Court, apparently touching on the same point, said: (at page 2)

> "Nowhere in the specific allegations concerning the agreement is it alleged that *USG* was not free to price its wallboard as it chose." (Emphasis added)

Unless the Court mistakenly meant to refer to the plaintiff instead of to USG, the quoted statement confuses the matter. Manipulation of prices by USG might be expected to enable USG to raise its prices, rather than to render USG less free to do so. In this respect the Court's remark is enigmatic and is not supportive of the court's reasoning or decision.

Paragraph 17 in the complaint alleged a "direct impairment" of plaintiff's "pricing ability and independence" and goes on to briefly explain why the impairment occurred, including the fact that plaintiff was "forced to purchase and resell" the USG wallboard at higher prices fixed by the conspiracy. Looking at paragraph 27, and fairly construing the rest of the facts stated in the complaint, it would seem that plaintiff has alleged the essential facts necessary to state a claim for price fixing. What the Seventh Circuit has done is to brand these allegations a mere "characterization." It would be better for the Supreme Court once and for all to lay this pleading problem to rest and to point out to the lower courts that "characterization" is permitted when it relates to an ultimate fact to be proven.

In *United States v. Employing Plasterers Ass'n of Chicago*, 347 U.S. 186, 189, 74 S.Ct. 432 (1954) the Supreme Court reversed a judgment of the Seventh Circuit approving dismissal of an antitrust complaint and said:

> * * * And where a bona fide complaint is filed that charges every element necessary to recovery, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.

The most reasonable view of the Seventh Circuit's opinion in *Richard's Lumber* is that there was an insufficient statement of evidential facts, in that plaintiff characterized the effect of the allegedly illegal arrangement without setting forth details of how or why such an effect would take place. This does not justify dismissal.

It is possible to interpret the Seventh Circuit's decision as holding that the plaintiff's allegations did not sufficiently demonstrate that plaintiff was within the "target area" of the alleged price fixing. The definition of "target area" was stated by Mr. Justice White in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981 (1968) as follows:

> . . . it would be enough with respect to causation if the defendant 'materially contributed' to plaintiff's injury,—or 'substantially contributed, notwithstanding other factors contributed also.' The plaintiff need not show the illegality was a more substantial cause than any other.

It was also stated another way in *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418 (4th Cir. 1966):

> * * * Target area has been defined as the area "which it could reasonably be forseen would be affected by the anti-trust violation." In another case it was said that "if a plaintiff can show himself within the sector of the economy in which the

violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he had standing to sue under Section 4."

One of the best short explanations of "target area" is found in *Stickells, Federal Control of Business—Anti-trust Laws*, Section 187. While it is hard to generalize, it may be said that the "derivative" plaintiff is seldom within the "target area." For example, the stockholder, employee, creditor or lessor of a corporation, affected by price fixing may not have an individual interest such that the injury accrued to him as opposed to the entity to which he relates.

Truly it beggars understanding to suppose that a wallboard dealer such as the plaintiff, without whom the alleged "corporate discount" scheme could not have worked, is clearly outside the target area of the discount. In *Wall Products Co. v. National Gypsum Co.*, 1973 CCH Trade Cases, Section 74,461, the dealers were the lead class in those consolidated class actions involving price fixing in the gypsum wallboard industry.

If the *Richard's Lumber* decision is viewed as a lack of sufficient allegations for a "target area" showing, the Seventh Circuit must be deemed incorrect in this regard. Furthermore, a determination that a plaintiff is outside the "target area" should almost never be made in response to a Motion to Dismiss.

In summary of the pleading aspects of this matter, the Seventh Circuit would seem to have been mistaken in one or all of three different respects in its application of the law:

(1) not enough evidential facts were pleaded; or,
(2) characterizations were pleaded; or
(3) a "target area" showing was not pleaded.

Surely, this *Richard's Lumber* decision is a throwback to *Radovich*, which was decided 20 years ago and which should have set the courts of appeal on a correct compass heading with respect to summary dismissal of pleadings.

REASONS FOR GRANTING THE WRIT

1. The decision of the Seventh Circuit sets a precedent approving secret pricing arrangements in two industries. Parties to the arrangement are each dominant in their respective industry. The gypsum wallboard industry is a major industry national in scope with a history of price fixing. *cf. Wall Products Co. v. National Gypsum Co.*, 1973 CCH Trade Cases, § 74,461. K&B, Inc., also operates on a nationwide basis through its subsidiaries. Because of this, the decision will probably affect the pricing policies for gypsum wallboard throughout the United States. The impact of the decision will therefore not be slight or parochial, and may affect other industries wherein products are homogeneous and price is the principal competitive factor.

2. It is once more necessary for the Supreme Court to exercise its powers of supervision over the lower courts in order to clearly point out to them that motions to dismiss are not favored. The *Radovich* and *Conley* discussions of 20 years ago are being forgotten by the lower courts. The doctrine of "insuperable bar to relief" as the only justification for dismissal is simply not being applied. Periodically, this court must refocus and reemphasize basic pleading rules. It should not be necessary, but it is.

3. In order for private antitrust actions for treble damages to be an effective means of enforcing the statutes, the aim of a reasonably quick adjudication on the merits is imperative. A plaintiff's complaint should not be the subject of repeated dismissals in a game of pleadings maneuvers. This court should make it clear that an antitrust complaint should virtually never be dismissed for failure to state a claim under Rule 12(b)(6) on the premise that insufficient evidential facts are stated, or that the allegations made are only "characterizations." Characterization, in legal pleadings, is like beauty, which frequently exists only in the eye of the beholder.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(ARGUED JUNE 10, 1976)
September 20, 1976.

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

No. 76-1245

RICHARD'S LUMBER AND SUPPLY COMPANY, individually, and RICHARD'S LUMBER AND SUPPLY COMPANY, as representatives of a class,

Plaintiffs-Appellants,

v.

UNITED STATES GYPSUM COMPANY, KAUFMAN AND BROAD, INC., KAUFMAN AND BROAD HOME SALES, INC., and KAUFMAN AND BROAD HOMES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74 C 3781 — **Julius J. Hoffman**, *Judge.*

ORDER

The gist of the antitrust violation charged in this private treble-damage action is that a gypsum wallboard manufacturer induced the specification of its wallboard in residential construction projects by granting rebates to the developers of the projects. Plaintiff is a retail building materials dealer which sold wallboard to drywall contractors, who installed it in construction projects. The defendants, in addition to the wallboard manufacturer, are developers of construction projects who received rebates. We affirm the District Court's judgment in favor of the defendants.

Plaintiff is Richard's Lumber and Supply Company, an Illinois retail dealer in building materials. It brings this action against United States Gypsum Company (USG), which manufactures gypsum wallboard used in home construction, Kaufman and Broad, Inc. (K & B), which engages in the construction and sale of residential housing, and two[1] K & B subsidiaries which carry on construction activities in Illinois.[2] Plaintiff's allegations are in substance as follows: Gypsum wallboard is a

[1] Originally, the complaint included six subsidiaries, but four were dismissed pursuant to stipulation of the parties.

[2] An identical action, involving the same parties, was brought in 1972 in the Northern District of Illinois, No. 72-C-1232, but was dismissed without prejudice due to the plaintiff's failure to comply with discovery orders. Over a year later, plaintiff attempted to reopen that judgment, but the District Court held the motion untimely; we affirmed in an unpublished order, No. 75-1390. Both actions, as originally filed, were denominated class actions, the plaintiffs seeking to represent a class consisting of all intermediate wallboard dealers who had supplied wallboard to contractors working for K & B subsidiaries in Illinois. Since the District Court failed to make a class determination, this action will be treated on appeal as an action by the named plaintiff alone. *Lagorio v. Board of Trade*, 529 F.2d 1290, 1291 (7th Cir. 1976).

homogeneous product which does not vary from manufacturer to manufacturer. From 1968 through 1972 there existed an arrangement between USG and K & B whereby K & B received a rebate, or "corporate discount" (calculated on a sliding scale, as a percentage of the price paid for USG board), on USG gypsum wallboard purchased for use in its developments.[3] The purchasers of the board were drywall contractors engaged by the K & B subsidiaries. The contractors purchased the board from plaintiff and other building materials dealers. To ensure the maximum possible usage of USG board in their projects, K & B subsidiaries were told by the parent to specify USG board to their drywall contractors, and USG sales representatives reported monthly to each subsidiary (which cross-checked their figures) and to K & B on the amount of USG wallboard that had been purchased for use in K & B developments. Each month USG paid the rebate to the parent. The second amended complaint, which we later hold should be treated as filed, adds that the parent then credited various amounts to different subsidiaries, based on their use of USG board, through intercorporate accounts. The K & B subsidiaries, although not parties to the agreement between USG and K & B, were alleged to be members of the alleged conspiracy nevertheless, in that they acted to "aid, abet, agree, acquiesce in and render practical" the agreement. It is alleged that this arrangement between what plaintiff describes as the country's largest manufacturer of gypsum wallboard and the country's largest home-

[3] Richard's also alleged that USG guaranteed and thus made possible a $20,000 loan to K & B and maintained compensating balances in at least two banks for the benefit of K & B as part of the consideration for entering into the agreement.

builder constituted illegal price-fixing.[4] Richard's adds in its second amended complaint that the existence of this rebate plan "compelled" him to sell only USG wallboard to contractors working for K & B subsidiaries (except when USG supplies became scarce) and thus forced him to buy the more expensive USG products. Richard's also alleges that the agreement produced artificially high prices for USG board. All this, it is alleged, damaged Richard's in the sum of $20,000.

The District Court granted K & B's motion to dismiss the complaint on grounds of improper venue and lack of personal jurisdiction, holding that K & B was not, through the activities of its subsidiaries or otherwise, "transacting business" in Illinois within the meaning of the Clayton Act's venue provisions. The court also granted USG's motion for summary judgment, holding that plaintiff's action against USG was barred by a covenant not to sue executed on behalf of a class of which plaintiff was a member in consideration of the settlement of a prior antitrust class action against USG and other gypsum manufacturers. These rulings were made in April and May 1975 by order "allowing" the motions.

On January 13, 1976, the court ruled orally in favor of the remaining two defendants, the K & B subsidiaries, granting their motion to dismiss, on the grounds that plaintiff lacked standing to sue and that the complaint failed to state a claim for price-fixing. No order was entered on that date, however. After the judge announced his ruling, plaintiff's counsel said that he would seek leave to amend, and the judge replied that he would rule on the proposed amendment if and when presented.

[4] Plaintiff also alleged that the arrangement constituted a tying arrangement and an attempt to monopolize, but these theories have been abandoned.

One month later, on February 12, plaintiff presented a motion for leave to amend and an accompanying proposed second amended complaint. The court denied the motion on that date as untimely under Rule 59(e), Fed. R. Civ. P., and not supported by a sufficient showing to be allowable under Rule 60(b), and on the further ground that the second amended complaint still failed to state a price-fixing claim. On the same date, February 12, the court entered, in addition to the order denying leave to amend the complaint, an order dismissing the plaintiff's first complaint *nunc pro tunc* as of January 13. Plaintiff immediately, on the same day, filed a notice of appeal from all dismissal orders the court had entered. On February 18 plaintiff presented a motion for relief from the January 13th judgment, arguing that the 10-day limit of Rule 59(e) did not apply because no written order had been entered, and, even if the *nunc pro tunc* judgment was proper, plaintiff's counsel's misunderstanding as to the proper time for requesting leave to amend constituted a "mistake" or "excusable neglect" under Rule 60(b), Fed. R. Civ. P., that would be grounds for reopening the judgment. This motion too was denied by entry of an order on February 18. Plaintiff later filed an amended notice of appeal including that order among those appealed from.

I.

Timeliness of Richard's Motion for Leave To Amend, Appealability, and Related Matters

The motion for leave to file the second amended complaint was not untimely. The order allowing the motion of the K & B subsidiaries to dismiss that complaint was not a final order, and no order was ever entered dismissing the action. As Professor Moore states,

> "Dismissal of a *complaint* is not a final and appealable order unless it is followed by entry of a judgment dismissing the *action*." 2A J. Moore, *Federal Practice* ₱ 12.14 at 2338-2339 (2d ed. 1975).

Inasmuch as there was no judgment when plaintiff presented his motion for leave to amend on February 12, neither Rule 59(e) nor Rule (60(b) had any application. This would be so even if we were to treat the order of dismissal entered *nunc pro tunc* on February 12 as if it had been entered on January 13.[5]

The rule that an order merely dismissing the complaint and not the action is not final and appealable is subject to the qualification that the order will be regarded by the reviewing court as final if the trial court has "determined that the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make, thereby entitling plaintiff to assume that he had no choice but to stand on his complaint." *Marshall v. Sawyer*, 301 F.2d 639, 643 (9th Cir. 1962); see 9 J. Moore, *Federal Practice* ₱ 110.13[1]. The order of February 12 denying leave to amend was alternatively grounded on the insufficiency of the second amended complaint. The District Court thus unequivocally determined that the defects in the complaint could not be cured by amendment. The order allowing the motion to dismiss the K & B subsidiaries will therefore be viewed by this court as a judgment which became final on February 12.

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[5] While it is unnecessary for us to rule on the point to decide this case, we note that a *nunc pro tunc* entry of judgment, which is within the power of the court when the interests of justice require it, 6A J. Moore, *Federal Practice* ₱ 58.08 at 58-306, citing *Mitchell v. Overman*, 103 U.S. 62, 64-65 (1880), cannot be used to shorten the time period for motions after judgment. 6A J. Moore, *supra*, ₱ 58.08 at 58-309.

The earlier orders granting K & B's motion to dismiss on venue and jurisdictional grounds and USG's motion for summary judgment may also be treated as final despite the absence of an entry of judgment on these orders. It is clear from the transcript of the hearing at which the court ruled on the venue motion that the court determined that the defects in the complaint could not be cured by amendment. The same is true with respect to the summary judgment ruling, even assuming that the order "allowing" the motion for summary jugment was not tantamount to the entry of judgment. Inasmuch as the rulings on the three motions are to be treated as final, the action became final on February 12 and amounted to a final disposition of the entire case, and at that point the appeal lay from the final judgment of February 12 and the prior orders. Plaintiff's notice of appeal and amended notice of appeal were timely.

In opposing plaintiff's motion for leave to amend before the District Court, counsel for K & B and its subsidiaries argued that the court should exercise its discretion to deny leave to file because plaintiff had been given more than ample opportunity to attempt to state a claim. A prior action involving the same facts and against the same defendants, in which two amended complaints had been filed, had been dismissed without prejudice for failure to comply with discovery orders. The second amended complaint in the case at bar was the sixth complaint filed by the plaintiff against the defendants based on the same facts. There is doubtless a point at which the district court is justified in refusing leave to amend to a plaintiff who has had ample opportunity to attempt to state a claim. Because the district judge did not base his refusal of leave to amend on this ground, however, we need not decide whether that point had been reached in the case at bar. We shall assume, since the district judge based his refusal on two

other grounds, that he did not consider such a ruling to be appropriate. We therefore treat the second amended complaint as if it had been filed and dismissed for insufficiency.

II.

VENUE AS TO K & B

In a private antitrust action venue is determined under the liberal provisions of the Clayton Act, 15 U.S.C. § 22, as well as by the general venue statute, 28 U.S.C. § 1391. Thus, a corporate defendant may be sued in any district where it is "an inhabitant . . . may be found or transacts business," 15 U.S.C. § 22, or in the district in which the claim arose, 28 U.S.C. § 1391(b). Where there is extraterritorial service of process on the defendant, the existence of personal jurisdiction depends on whether, under these statutes, venue has been properly laid. *Pacific Tobacco Corp. v. American Tobacco Co.*, 338 F.Supp. 842, 844 (D. Ore. 1972); *Chemical Specialties Sales Corp. v. Basic, Inc.*, 296 F.Supp. 1106, 1109 (D. Conn. 1968).

Once the defendant has challenged venue in a timely manner, the burden of proving proper venue lies with the plaintiff. *Call Carl, Inc. v. BP Oil Corp.*, 391 F.Supp. 367, 370 (D. Md. 1975); *Redmond v. Atlantic Coast Football League*, 359 F.Supp. 666, 669 (S.D. Ind. 1973). In this case, plaintiff, after extensive discovery in this and an identical previous action,[6] failed to come forth

[6] From the record it appears that in the prior case Judge Will ruled that there was venue over K & B. While the plaintiff did not argue that this ruling should control, we note in passing that rulings in a prior action dismissed without prejudice are not conclusive on the issue decided. *Robinson v. American Car & Foundry Co.*, 135 F.2d 693, 696 (7th Cir. 1935); *Brunswick Corp. v. Chrysler Corp.*, 287 F.Supp. 776, 778 (E.D. Wis. 1968).

with any proof that K & B either inhabits or does such a quantity of business that it may be said to be "found" in the Northern District of Illinois. Neither has he shown that K & B itself directly transacts business in the state. Rather, he has sought to show that K & B is "transacting business" here through the medium of its subsidiaries. While domination of a subsidiary will bring an out-of-state parent within the scope of the Clayton Act's venue provisions, it is well settled that the mere fact that the subsidiary is wholly-owned and that there are some interlocking directors or officers is not enough to demonstrate that domination. *Call Carl, Inc. v. BP Oil Corp., supra*, 391 F.Supp. at 371; *Hayashi v. Sunshine Garden Products, Inc.*, 285 F.Supp. 632, 634 (W.D. Wash. 1967), *aff'd*, 396 F.2d 13 (9th Cir. 1968).

There are currently two tests for determining what constitutes a sufficient degree of control to render a subsidiary a mere instrumentality through which the parent transacts business in the state. Following *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), some courts have held that proof of control over the subsidiary's day-to-day activities or the failure to observe corporate formalities is necessary. *O.S.C. Corp. v. Toshiba America, Inc.*, 491 F.2d 1064, 1067-1068 (9th Cir. 1974); *Massey-Ferguson Ltd. v. Intermountain Ford Tractor Sales Co.*, 325 F.2d 713 (10th Cir. 1963); *Global Publishing Corp. v. Grolier, Inc.*, 273 F.Supp. 637, 638 (D. Mass. 1967). Others have held that *Cudahy's* applicability to the antitrust area was negated by the Supreme Court in *United States v. Socophony Corp.*, 333 U.S. 795 (1948), in which the test for determining whether a corporation was "transacting business" within the Clayton Act venue provisions was held to be whether, from an ordinary businessman's point of view, "substantial business operations" were being carried on in the district. *Call Carl, Inc. v. BP Oil Corp., supra,*

391 F.Supp. at 373. This opinion has been read by some courts as requiring a shift in emphasis from corporate formalities to the ability of the parent, in the light of the total relationship between the parent and the subsidiary, to influence major decisions that lead or could lead to antitrust violations. See *Zenith Radio Corp. V. Matsushita Electric Industrial Co.*, 402 F.Supp. 244, 327 (E.D. Pa. 1975); *Hitt v. Nissan Motor Co.*, 399 F.Supp. 838 (S.D. Fla. 1975); *Flank Oil Co. v. Continental Oil Co.*, 277 F.Supp. 357, 365 (D. Col. 1967).

Under either test, plaintiff in this case has failed to meet his burden. The affidavit of K & B's vice president Louis Berkowitz, clearly shows that K & B did not interfere in the subsidiary's day-to-day operations; on the contrary, the subsidiaries were allowed to pursue their own independent policies on such matters as the number of housing units to be built, advertising campaigns, negotiations with municipalities, and construction contracts and subcontracts. Corporate formalities were observed and there was "minimal" overlap between the officers and directors of the various corporations. The only evidence of intercorporate "overlap" that the plaintiff could point to to rebut this showing was the crediting to the subsidiaries of the USG rebate through a system of intercorporate accounts. Without more, this type of intercorporate transaction is not sufficient to establish "day-to-day control" over the subsidiary. See *San Antonio Telephone Co. v. American Telephone & Telegraph Co.*, 499 F.2d 349 (5th Cir. 1974).

If the second test referred to above is applied, plaintiff still must fail because he has shown little or nothing about the relationship of the related corporations. Instead, he has relied solely on the fact that the subsidiaries participated in the rebate plan and received, in return, a credit to their accounts on the parent

company's books. There is no evidence that a completely independent corporation would not have accepted the arrangement proposed by K & B to its subsidiaries: a memo from Louis Berkowitz to the subsidiaries described the income from the rebates as "substantial," while promoting and keeping tabs on the use of USG board "require[d] little or no effort on [the subsidiaries'] part."

In effect, plaintiff relies, not on the domination of the subsidiaries by the parent, but rather on the existence of the alleged conspiracy itself and the presence in the district of the other co-conspirators (the subsidiaries and USG) to confer venue. While a "co-conspirator" theory of venue, which makes one conspirator the "agent" of the other, was apparently accepted by the Ninth Circuit in *Giusti v. Pyrotechnic Industries, Inc.*, 156 F.2d 351 (1946), *cert. denied*, 329 U.S. 787 (1946), it has never been accepted in any other circuit. *H.L. Moore Drug Exchange v. Smith, Kline & French Laboratories*, 384 F.2d 97, 98 (2d Cir. 1967); *ABC Great States, Inc. v. Globe Ticket Co.*, 310 F.Supp. 739, 743 (N.D. Ill. 1970); *West Virginia v. Morton International, Inc.*, 264 F.Supp. 689, 692-695 (D. Minn. 1967); *Commonwealth Edison Co. v. Federal Pacific Electric Co.*, 208 F.Supp. 936, 941-942 (N.D. Ill. 1962). See also *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, 97 (C.D. Cal. 1971), giving a narrow reading to the *Giusti* theory. In *Bankers Life & Casualty v. Holland*, 346 U.S. 379, 384 (1953), the Supreme Court referred in dicta to this theory as "a frivolous albeit ingenious attempt to expand the statute." We do not accept the theory here, and thus we must hold that defendant K & B is not "transacting business" within the district.

However, venue may have been properly laid if the Northern District of Illinois is a district "where the

claim arose." To determine the situs of an antitrust action, the proper test looks, not to the place where the injury occurred, but rather to the "weight of the contacts." *United States Dental Institute v. American Association of Orthodontists*, 396 F.Supp. 565, 574 (N.D. Ill. 1975); *Redmond v. Atlantic Coast Football League, supra*, 359 F.Supp. at 670; *ABC Great States, Inc. v. Globe Ticket Co., supra*, 310 F.Supp. at 743. *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*, 291 F.Supp. 252, 260 (E.D. Pa. 1968). Under this analysis, a claim arises in a district where there was injury and where the defendant committed an overt act in furtherance of the conspiracy which is a significant and substantial element of the offense. *Philadelphia Housing Authority, supra*, 291 F.Supp. at 260. Where "the defendants and the plaintiffs are farflung and the conspiracy is alleged to have been nation-wide" "the key to venue" is whether "the most significant conspiratorial acts of the defendants," such as negotiations leading to the agreement, were performed in the district. *ABC Great States, Inc. v. Globe Ticket Co., supra*, 310 F.Supp. at 743. See also *United States Dental Institute v. American Association of Orthodontists, supra*, 396 F.Supp. at 574. While plaintiff alleged a great many facts about the K & B-USG relationship, there is no evidence in the record linking any of the negotiations or the agreement to Illinois. Again, the plaintiff's only showing of a relationship with Illinois is K & B's dealings with its subsidiaries which we have already held insufficient to confer venue.

III.

COVENANT NOT TO SUE ASSERTED BY USG

In *In re Gypsum Cases*, Civ. No. 46414-A AJ2 (N.D. Cal. USG was a defendant in a complex class antitrust

action, in which it and several other manufacturers of gypsum wallboard were charged with a conspiracy to fix prices. In 1973, under the supervision of the district court, a settlement agreement was reached in which the defendants paid $67,640,000 (with USG paying the major portion of it) in return for the following agreement not to sue, executed on behalf of the various plaintiff classes:

> "each plaintiff and intervenor, and each class member which does not elect to be excluded as herein provided, shall be deemed to have covenanted to refrain from proceeding against the settling defendants, or any of them, on any present or prospective claim pertaining to any building any construction products manufactured from gypsum, including any gypsum or related products and relating to any direct or indirect purchases or transactions occurring prior to the dates of the settlements, which agreements are dated in the period, July 10 to August 15, 1973, and which claims are asserted under Federal or State Antitrust law or based on any allegations of collusion, conspiracy or similar assertions."

Notice of the proposed settlement, including a listing of the various claims of the plaintiffs and the covenant not to sue quoted above, was sent to all members of the plaintiff classes, which included Richard's (who was a member of a class of wallboard dealers). Richard's admits that the notice was received and that it did not take the opportunity provided either to opt out or to object to the fairness of the proposed settlement. When the fund was established, plaintiff participated in it.

Richard's admits that he was a member of the plaintiff class in *In re Gypsum Cases;* we do not understand him to be attacking either the propriety of the notification procedures used or the adequacy of the representation of his class in the prior action. Rather, he

claims that the language of the covenant not to sue cannot be construed to include, as on its face it clearly does include, the plaintiff's antitrust claim based on USG's allegedly illegal conduct from 1968 through 1972.

A general release (or a broad covenant not to sue) is not ordinarily deemed contrary to public policy simply because it involves antitrust claims. Thus, in the absence of proof that it was the product of duress, such a release is fully enforceable. *Fabert Motors, Inc. v. Ford Motor Co.*, 355 F.2d 888 (7th Cir. 1966); *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975). There is no claim of duress here. Plaintiff was represented in the California litigation by the attorney appointed to represent his class and advised in Illinois by his own attorney; he was given all the pertinent facts about the settlement in the class notice, including the text of the proposed covenant not to sue, and he was well aware of his additional antitrust claim against USG (which had already been filed in Illinois); plaintiff had a sufficient amount of time in which to consider the settlement proposal and the options presented to him by the court; and, finally, plaintiff's interests received additional protection through judicial supervision of the settlement. See *Fabert Motors, Inc. v. Ford Motor Co., supra*, 355 F.2d at 890-891.

Despite the fact that the covenant is clear and unconditional and was not extorted from the plaintiff by unfair means, Richard's argues that it would be a violation of his due process rights to apply it so as to bar the instant action against USG. Under his view, the covenant cannot constitutionally be interpreted to bar any claims except those which would have been barred in any event by the res judicata effect of the dismissal of the action with prejudice. We find plaintiff's contention to be without merit.

In a class action settlement, due process requirements are satisfied when notice has been given to the individual members of the class and the standards of adequate representation have been met. *Research Corp. v. Edward J. Funk & Sons Co.*, 15 F.R.Serv.2d 580 (N.D. Ind. 1971); *Rivera v. Chicken Delight, Inc.*, 17 F.R.Serv.2d 473 (S.D. Tex. 1973). Plaintiff does not attack the settlement on these grounds, nor does he suggest any concrete reason why a novel interpretation of the covenant not to sue is necessary for the protection of absent parties. *Cf. Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

Therefore, we hold that USG's motion for summary judgment was properly granted.

IV.

Sufficiency of the Second Amended Complaint

The last issue to be considered is the price-fixing claim asserted against the K & B subsidiaries in the second amended complaint. We agree with the District Court that plaintiff failed to state a claim of vertical price-fixing under § 1 of the Sherman Act, 15 U.S.C. § 1. The essence of such a claim is impairment of the dealer's independence in setting a resale price for the goods in question. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Knuth v. Erie-Crawford Dairy Cooperative Association*, 326 F.Supp. 48, 53 (W.D. Pa. 1971), *modified on other grounds*, 463 F.2d 470 (3d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973); *Checker Motors Corp. v. Chrysler Corp.*, 283 F.Supp. 876, 882 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969). In this case, while plaintiff has alleged that the agreement allowed USG to inflate the wholesale price of its wallboard, he does not allege that USG and the other

defendants sought to influence, in any way, the retail price of the commodity, or that he was not free to set his own price. Indeed, from the record it appears that the USG-K & B agreement contemplated a fluctuating retail market: thus, K & B was not to receive any rebate on wallboard purchased for less than $33.00 per thousand square feet, and the rebate percentage would rise with the price paid to a high of 5 per cent on $36.00 per thousand square feet. Because plaintiff failed to allege any facts indicating that his "ability to sell in accordance with [his] own judgment" was impaired, his complaint cannot be construed to state a price-fixing claim. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S 211, 213 (1951).

The District Court's alternative holding with respect to the second amended complaint, *viz.*, that it failed to state a claim upon which relief could be granted, was therefore correct.

Despite its length, which is attributable to the nature and number of the issues presented, the foregoing statement of the reasons for our decision does not meet the criteria for publication stated in our Circuit Rule 35(c)(1) but rather fits those stated in subparagraph (c)(2)(ii) of that rule. We therefore issue our decision as an unpublished order.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 14, 1976

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

No. 76-1245

RICHARD'S LUMBER AND SUPPLY COMPANY, individually, and RICHARD'S LUMBER AND SUPPLY COMPANY, as representatives of a class,

Plaintiffs-Appellants,

v.

UNITED STATES GYPSUM COMPANY, KAUFMAN AND BROAD, INC., KAUFMAN AND BROAD HOME SALES, INC., and KAUFMAN AND BROAD HOMES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74 C 3781—**Julius J. Hoffman**, *Judge.*

ORDER

On consideration of the "petition for rehearing en banc, or, alternatively, for rehearing by the panel," filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having

voted to grant the petition for rehearing in banc, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petitition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED

In the petition plaintiff argues that the statement at the end of paragraph 17 of the second amended complaint that plaintiff "was forced to purchase and resell the U.S. Gypsum wallboard at higher prices which were fixed by the aforesaid agreement and conspiracy" amounts to an allegation that the terms of the agreement and conspiracy included fixing the prices plaintiff paid and the prices at which he resold. It appears, however, from a reading of the entire paragraph in which the quoted language is found, as well as from the more specific allegations elsewhere in the pleading which describe the agreement, that the quoted language was merely plaintiff's characterization of the rebate agreement described in the specific allegations and the effect of that agreement and not an allegation that the conspiracy called for the fixing of wholesale and retail prices. Nowhere in the specific allegations concerning the agreement is it alleged that USG was not free to price its wallboard as it chose. Nor do those allegations state that the conspiracy dealt in any way with the resale prices plaintiff set. Moreover, that could not have occurred without plaintiff's knowledge, and he alleges in paragraph 19 of the pleading that he did not learn of the terms of the conspiracy until after it had been going on for several years. In short, fairly read, plaintiff's complaint alleges a rebate agreement between K & B and USG which had the effect of allowing USG to charge higher prices because of the incentive it gave K & B for specifying USG wallboard and that the economic effect of the agreement was that plaintiff had to pay more and charge more for the wallboard it handled. This does not amount to a price-fixing agreement.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 3781

RICHARD'S LUMBER & SUPPLY COMPANY,

Plaintiff,

v.

KAUFMAN & BROAD HOME SALES, INC., and KAUFMAN & BROAD HOMES, INC.,

Defendants.

SECOND AMENDED COMPLAINT AT LAW

FIRST CLAIM FOR RELIEF

Now comes the Plaintiff, RICHARD'S LUMBER & SUPPLY COMPANY, by its attorneys, JOHN BERNARD CASHION and LAWRENCE N. MARINO, and complaining of the Defendants, KAUFMAN & BROAD HOME SALES, INC., and KAUFMAN & BROAD HOMES, INC., says:

1. The plaintiff corporation and each defendant corporation is each an Illinois corporation having its principal place of business in Illinois; jurisdiction is founded upon a violation of the antitrust laws of the United States, Title 15, Section 1, United States Code.

2. The defendants are subsidiaries of the parent known as Kaufman & Broad, Inc., (hereinafter: "K&B") headquartered in Los Angeles, California; the defendants at all times mentioned herein have been engaged in the construction and/or sale of residential housing units in Illinois.

3. During the years 1968 through 1972, during part or all of the aforesaid period, there existed an agreement, understanding, combination, conspiracy, course of conduct, conscious acquiescence, independent conscious parallel action pursuant to a tacit understanding coupled with assistance, or other arrangement as between the corporate parent, K&B, and United States Gypsum Company, whereby United States Gypsum Company was to pay and did pay to the parent, K&B, certain sums of money in a form referred to as a "corporate discount"; and during part or all of the aforesaid period of time, in addition to payment of the aforesaid "corporate discount", United States Gypsum Company made possible and guaranteed repayment of at least one loan in the sum of Two Hundred Thousand Dollars ($200,000.00), and in addition maintained certain "compensating balances" in at least two banking institutions.

4. The parent, K&B, and the defendant corporations, as a matter of custom and practice did little or no actual construction work in the construction of residential on-site housing; instead, all phases of the construction work were contracted out to subcontractors; all or virtually all of the erection of gypsum wallboard was handled in this manner, that is, by letting a separate contract to a subcontractor for such work; all or virtually all of the subcontracts for the installation of gypsum wallboard provided for lump sum payments to such subcontractor installers of gypsum wallboard, with the payment to include labor, materials and the subcontractor's profit, so that the parent, K&B, was never, or virtually never, a direct purchaser of the gypsum wallboard involved in the construction or erection of residential on-site housing by K&B or any of its subsidiary corporations, nor was the gypsum wallboard subcontractor acting as an agent of the parent, K&B, or its subsidiary corporations in the

purchase of the gypsum wallboard for installation in housing development projects of the parent, K&B, or any of its subsidiary corporations; the aforesaid "corporate discount" was paid by United States Gypsum Company to the parent, K&B, based upon a percentage of the selling price of gypsum wallboard by United States Gypsum Company to the gypsum wallboard subcontractor or supplier who purchased the wallboard directly from United States Gypsum Company, the volume of such purchases was arrived at by figures computed by the sales force of United States Gypsum Company and crosschecked by supervisory personnel of the parent, K&B, or its subsidiary corporations.

5. During the years 1968 through 1972, during all or part of said period, there existed a combination or conspiracy among the parent, K&B, and the defendant corporations, to aid, abet, agree, acquiesce in and render practical to the aforesaid agreement or understanding, combination, conspiracy, course of conduct, conscious acquiescence, independent conscious parallel action pursuant to a tacit understanding coupled with assistance, or other arrangement, as between the parent, K&B, and United States Cypsum Company.

6. The Plaintiff, RICHARD'S, operated a lumber yard and building material supply business located in the City of Harvey, County of Cook, State of Illinois. In pursuance of its business, the Plaintiff, RICHARD'S, purchased gypsum wallboard from United States Gypsum Company and resold the gypsum wallboard to various contractors and subcontractors employed by the subsidiary corporations of the parent, K&B, for the purpose of erecting gypsum wallboard in residential housing units being constructed by the parent, K&B, in the State of Illinois through the agency of various subsidiary corporations, all of which subsidiary corporations are wholly owned by the parent, K&B, one or more of all of these

corporations are engaged in the construction or erection of residential housing units in one or more of all of the subdivisions known as Provincetown, Gingerwood, Apple Tree Hazel Crest, Cinnamon Creek, and Sugar Brook, all of which were located in the metropolitan Chicago area.

7. During the years 1968 through 1972, during all or part of said period, at least until September 23, 1971, the Plaintiff, RICHARD'S, purchased gypsum wallboard from United States Gypsum Company and resold the gypsum wallboard to various contractors employed by the subsidiary corporations of the parent, K&B; plaintiff was compelled to sell only gypsum wallboard manufactured by United States Gypsum Company. The aforesaid agreement or understanding, combination, conspiracy, course of conduct, conscious acquiescence, independent conscious parallel action pursuant to a tacit understanding coupled with assistance, or other agreement, was in force at all times during the years 1968 through 1972, during all or part of said period, during which period of time the Plaintiff, RICHARD'S, was dealing with the subcontractors employed by the subsidiary corporations of the parent, K&B, for the purpose of erecting gypsum wallboard in homes being constructed in the aforesaid subdivisions, with the exception that the aforesaid agreement or arrangement was not in effect only at such times as when the distribution of gypsum wallboard by United States Gypsum Company was so far behind schedule that plaintiff was allowed by defendant to supply a substitute gypsum wallboard from a different manufacturer to the contractor in the aforesaid subdivision.

8. All of the gypsum wallboard purchased by the Plaintiff, RICHARD'S, from United States Gypsum Company was shipped to the place of business of the plaintiff

in Harvey, Illinois, from manufacturing facilities of United States Gypsum Company located in the State of Indiana and in the State of Iowa.

9. Plaintiff, RICHARD'S, and other dealers similarly situated have a common interest in maintaining a free and unhampered market for purchase of gypsum wallboard from manufacturers of gypsum wallboard, and the conduct of the trade and business of plaintiff and other dealers in gypsum wallboard wholly depends on their ability to purchase gypsum wallboard for resale at a fair market price.

10. The aforesaid agreement or understanding, combination, conspiracy, course of conduct, conscious acquiescence, independent conscious parallel action pursuant to a tacit understanding coupled with assistance, or other arrangement, as between the parent, K&B, and United States Gypsum Company, and participated in by the subsidiary corporations of the parent, K&B, was undertaken as part of a combination or conspiracy to knowingly fix, control, raise and stabilize the price of gypsum wallboard in interstate commerce, to restrain trade in interstate commerce for gypsum wallboard and to preclude the plaintiff and other dealers marketing and distributing gypsum wallboard from dealing in interstate commerce except on the terms controlled by defendant and constituted:

a) price fixing in violation of 15 U.S.C., Section 1, on the part of the Defendant, K&B.

11. United States Gypsum Company is the largest manufacturer of gypsum wallboard in the United States, and the parent, K&B, is the largest builder of onsite residential housing units on a nationwide basis, and either of the aforesaid has sufficient economic power to appreciably restrain free competition in the market for gypsum wallboard; in the case of the Plaintiff,

RICHARD'S, a quantity of gypsum wallboard amounting to at least Eighty Thousand Dollars (80,000.00) was purchased by plaintiff from United States Gypsum Company and resold to contractors or subcontractors employed by the parent, K&B, and its subsidiary corporations in the construction of residential housing units in the aforesaid subdivisions.

12. As a result of the aforesaid agreement or understanding, combination, conspiracy, course of conduct, conscious acquiescence, independent conscious parallel action pursuant to a tacit understanding coupled with assistance, or other agreement, the Plaintiff, RICHARD'S, was compelled to pay an artificially and unreasonably high price for gypsum wallboard purchased by plaintiff from United States Gypsum Company to the extent of at least Twenty Thousand Dollars ($20,000.00), and the plaintiff is entitled under Title 15, Section 15 U.S.C., to treble damages of Sixty Thousand Dollars ($60,000.00) from the defendants plus a reasonable attorneys' fee and costs of suit.

13. Gypsum wallboard is a homegeneous product in that a sheet of wallboard manufactured by National Gypsum Company or Georgia Pacific Corporation or any other major wallboard manufacturer is substantially identical to and may be interchanged with a sheet of wallboard manufactured by United States Gypsum Company, and price competition among the different wallboard manufacturers is such that the principal distinguishing characteristics of sheets of gypsum wallboard manufactured by different manufacturers is the price of the wallboard itself.

14. The parent, K&B, directly benefited in money terms from the aforesaid corporate discount and in addition allocated various amounts of the discount among its corporate subsidiaries not by any physical transfer of checks or bank drafts but rather by means of compen-

sating book entries in the account books of its subsidiary corporations.

15. The compensating bank balances and $200,000 loan guarantee were part of the pattern of price fixing as between K&B and United States Gypsum designed to cement the relationship and provide further incentive to K&B to further the agreement and conspiracy, all at the direction of the corporate parent, K&B, and said loan was made to the parent, K&B, by the Northern Trust Company of Chicago, Illinois, and the defendant corporations benefited for the compensating balances and loan guarantee.

16. The purpose of the corporate discount and the agreement and conspiracy of K&B and United States Gypsum was to encourage the plaintiff and other similarly situated purchasers to specify United States Gypsum wallboard and also had the direct practical effect of rendering it impossible for the plaintiff to do otherwise than supply United States Gypsum gypsum wallboard so long as the plaintiff or any other wallboard dealer was to continue selling gypsum wallboard to contractors installing wallboard in residential housing units being constructed by K&B or any of its subsidiary corporations.

17. Plaintiff in selling the wallboard to contractors installing it in residential housing units constructed by K&B and its subsidiary corporations sustained a direct impairment of his pricing ability and independence because of the requirement that the wallboard must be manufactured by United States Gypsum and since it could have and would have been able to purchase substantially identical and homogeneous gypsum wallboard of manufacturers other than United States Gypsum at a lower price, but was prevented from doing so by the conspiracy and agreement as aforesaid, and was forced to purchase and resell the United States Gypsum

wallboard at higher prices which were fixed by the aforesaid agreement and conspiracy.

18. The aforesaid "corporate discount" was not made available by United States Gypsum to all purchasers of gypsum wallboard or even a majority of volume purchasers of wallboard and was made available to K&B, who was not even a purchaser of wallboard on a basis so secret that even the central regional sales manager of United States Gypsum, headquartered in the Chicago area, was not told of it, all of which was part of the scheme of price fixing put into effect.

19. The first time the plaintiff had any information whatsoever that K&B and United States Gypsum and the corporate subsidiaries of K&B were engaging in a special arrangement of any kind was during the year 1971, and the defendant actively and fraudulently concealed its activities including the corporate discount compensating bank balances and the $200,000.00 loan guarantee prior to and after said year; on information and belief plaintiff alleges that the "corporate discount" is still in effect on the premise that it is not in violation of the antitrust laws.

20. As a result of the aforesaid agreement or understanding, combination, conspiracy, course of conduct, conscious acquiescence, independent conscious parallel action pursuant to a tacit understanding coupled with assistance, or other arrangement, the Plaintiff, RICHARD'S, was compelled to pay an artificially and unreasonably high price for gypsum wallboard purchased by plaintiff from United States Gypsum Company to the extent of at least Twenty Thousand Dollars ($20,000.00).

WHEREFORE, Plaintiff, RICHARD'S LUMBER & SUPPLY COMPANY demands judgment against the Defendants, KAUFMAN & BROAD HOME SALES, INC., and KAUFMAN & BROAD HOMES, INC., in the sum of Sixty Thousand Dollars ($60,000.00), plus a reasonable attorneys' fee and costs of suit.

No. 76-964

In the
Supreme Court of the United States
October Term, 1976

RICHARD'S LUMBER AND SUPPLY COMPANY,
Petitioner,

vs.

KAUFMAN AND BROAD HOMES, INC., and
KAUFMAN AND BROAD HOME SALES, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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OPINIONS BELOW

No opinion was delivered by the court below with respect to the issues raised in this petition. An unpublished order was issued by the Seventh Circuit on September 20, 1976 pursuant to Circuit Rule 35. This order is found at Appendix A of the petition and is cited at 541 F.2d 284 (7th Cir. 1976) (Table).

Plaintiff petitioned for a rehearing, which was denied on October 14, 1976 in another unpublished order. This order is found at Appendix B of the petition.

In deciding to issue unpublished orders rather than opinions, the court below made the express finding that the case involved "arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance." Circuit Rule 35(c)(2)(ii). (Pet. 16a).

In the court below, defendant United States Gypsum Company ("USG"), moved the Seventh Circuit to issue its first order as a published opinion. The Court agreed to publish only so much of it as dealt with the issue of USG's covenant not to sue. 545 F.2d 18 (7th Cir. 1976) (per curiam). It denied USG's motion insofar as it requested publication of the entire order, including that part which dealt with the issue raised in this petition.

Thus, it is clear that the Court of Appeals did not consider plaintiff's price-fixing claim to be of sufficient importance to publish as an opinion in the unofficial reports.

QUESTION PRESENTED

Does the second amended complaint state a claim for price-fixing upon which relief can be granted?

ARGUMENT

INTRODUCTION

The petition in this cause does not raise any of the considerations for granting certiorari which are set forth in Supreme Court Rule 19(1)(b). Plaintiff does not contend that the Seventh Circuit decision was in conflict with the decision of another Circuit or of this Court. Nor does plaintiff argue that the Court of Appeals decided an important question of federal law which has not been, but should be, decided by this Court. The only reason given by plaintiff why this court should exercise its discretion to grant certiorari is that the Circuit Court "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." (Pet. 29-30).

It is submitted by defendants that the dismissal of the complaint does not warrant an exercise of this court's supervisory power. The Court of Appeals considered the allegations fully and concluded that they did not allege interference with plaintiff's pricing independence, therefore a claim of price fixing was not stated. Plaintiff filed three successive complaints in the trial court, and he had ample opportunity to allege sufficient facts. Plaintiff was unable to do so, therefore the second amended complaint was properly dismissed.

Plaintiff has preserved only the price-fixing issue in the petition. He has not disputed the propriety of the decision which dismissed K&B for improper venue. He has not disputed the propriety of the decision granting USG summary judgment on the covenant issue. More-

over, in the courts below plaintiff abandoned all claims that the corporate discount between USG and K&B constituted an illegal tying arrangement or an attempt to monopolize. Plaintiff confined himself to the contention that the allegations of the complaint constituted price fixing.[1]

THE SECOND AMENDED COMPLAINT DOES NOT STATE A CLAIM OF PRICE FIXING

The corporate discount which was in effect between USG and K&B provided for the payment to K&B by USG of a variable sum based upon the retail price of wallboard purchased by the K&B subsidiaries. The Court of Appeals found (based upon the complaint and certain additional discovery documents included in the record by plaintiff) that K&B received no discount on wallboard purchased for less than $33 per thousand feet and received a high discount of five per cent on wallboard purchased for $36 per thousand feet.

The important point about the discount is that it was an arrangement between the manufacturer, USG, and the ultimate purchaser, K&B. It was not an arrangement with the plaintiff. Therefore, the arrangement did not, in the words of the Court of Appeals, impair plaintiff's "ability to sell in accordance with [his] own judgment." (Pet.

[1] In the district court plaintiff took the following narrow position:

> "Plaintiff concedes that the facts as pleaded do not constitute a tying agreement. Plaintiff will drop the charge of attempted monopolization as pleaded. This leaves price fixing as the only issue."

Plaintiff pursued only the price-fixing theory in the Court of Appeals, and is therefore confined to that theory in this Court.

16a). All the arrangement did, according to the complaint, was to permit USG to inflate the price of wallboard it sold to plaintiff. It did not interfere with plaintiff's freedom to charge whatever price it wanted to its purchasers.

In the petition for rehearing below and in the petition for a writ of certiorari, plaintiff has made much of the conclusory allegation in paragraph 17 of the complaint that because of the corporate discount, plaintiff's pricing independence was impaired. But there is no allegation of fact that plaintiff was forced by USG or by K&B to set his prices at or above a certain level. Rather, plaintiff alleges that he was forced to buy USG wallboard and sell it to K&B at a higher price than he would have purchased and resold wallboard not manufactured by USG. This does not amount to an allegation of price fixing. It amounts to an allegation that plaintiff chose to maintain a certain minimum profit margin on all the wallboard he sold at retail, no matter how high the wholesale price.

In its order denying rehearing (Pet. 18a), the Court of Appeals correctly distinguished between that part of the complaint (e.g. ¶4) which described the specific facts of the agreement and that part which described the effect of the agreement (e.g. ¶17). The court below stated:

> Nowhere in the specific allegations concerning the agreement is it alleged that USG [sic] was not free to price its wallboard as it chose. Nor do these allegations state that the conspiracy dealt in any way with the resale prices plaintiff set. Moreover, that could not have occurred without plaintiff's knowledge, and he alleges in paragraph 19 of the pleading that he did not learn of the terms of the conspiracy until after it had been going on for several years. In short, fairly read, plaintiff's complaint alleges a rebate agree-

> ment between K & B and USG which had the effect of allowing USG to charge higher prices because of the incentive it gave K & B for specifying USG wallboard and that the economic effect of the agreement was that plaintiff had to pay more and charge more for the wallboard it handled. This does not amount to a price-fixing agreement. (Pet. 18a).

Much confusion is created in the petition by plaintiff's failure to realize the difference between an illegal price fixing agreement in which plaintiff's freedom to set his retail price is impaired, and the legal corporate discount at issue here which merely raises the wholesale price of USG-manufactured wallboard. Nothing in the complaint suggests that plaintiff was not free to charge a retail price as little as one cent above the wholesale price or as much as $10 above the wholesale price. The choice to peg his retail price of USG wallboard at a certain level was entirely that of plaintiff's. Therefore, a claim of price fixing has not been stated.

Plaintiff does not argue that the authorities relied upon by the Court of Appeals are incorrect. He argues that they are distinguishable.

For instance, plaintiff contends that *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969) is distinguishable from the case at bar, because the corporate discount here is secret, it is not available to all purchasers, it was paid to a non-purchaser (K&B) and made applicable to a homogeneous product. These distinctions are meaningless. The point of *Checker Motors* is that the $183 rebate, like the USG-K&B corporate discount, did not affect the pricing independence of the retailer, therefore a claim for price fixing was not stated.

Similarly, in *Knuth* v. *Erie-Crawford Dairy Cooperative Association*, 326 F. Supp. 48, 53 (W.D. Pa. 1971), *modified on other grounds*, 463 F.2d 470 (3rd Cir. 1972), *cert. denied*, 410 U.S. 913 (1973), the rebate paid by defendant to the individual dairies did not in any way affect the resale price of milk which was charged by the dairies, therefore no claim of price fixing was proved. Plaintiff attempts (at 15) to distinguish *Knuth* on the grounds that Richards (unlike the dairies) did not receive any rebate and that it had no knowledge that the corporate discount was being paid to K&B. Again, the distinction is meaningless. The point of *Knuth* is that the rebate paid to the dairies, like the USG-K&B corporate discount, did not affect the retailers' freedom to set prices, therefore it did not constitute price fixing.

The Court of Appeals cited *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968) as an example of illegal resale price maintenance. A newspaper publisher imposed a suggested retail price on its independent carriers, and when a carrier offered the newspaper for sale at a greater price, the publisher sold its newspaper directly to the carrier's customers at the suggested retail price. This device by which the publisher interfered with the carrier's pricing independence was held to violate Section 1. As was implied by the Court of Appeals, the device is wholly different from the corporate discount between USG and K&B, which in no way affected plaintiff's freedom to set his retail prices.

Plaintiff makes an argument (at 17-19) not before found in this case. He argues that the Court of Appeals improperly invoked a "passing-on" defense. This is incorrect. The court below did not deal with the issue of the validity of any of K&B's defenses. It held that the complaint did

not state a claim for price fixing. The court therefore did not reach the issue of whether, if the complaint had stated a claim, damages were passed on.

Plaintiff mistakenly argues that the Court of Appeals has imposed a requirement of specificity in pleading which is unduly strict. According to the authority cited by plaintiff, all that was required was that the complaint:

> be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade," [citation], and meet the requirement that petitioner has thereby suffered injury. *Radovich* v. *National Football League*, 352 U.S. 445, 453 (1957).

Neither of the requirements of *Radovich* has been met. Plaintiff neither alleged an unreasonable restraint of trade (price fixing) nor did he allege injury. With respect to the first requirement, the court below held that the failure to allege facts showing impairment of plaintiff's pricing independence precluded a finding of price fixing. With respect to the second requirement, plaintiff himself has recognized the shortcoming of his complaint in his petition to this Court:

> Plaintiff's complaint did not precisely set forth why or how he could sustain or suffer money damages by purchasing and reselling at an artificially high price. (Pet. 19).

Having failed to allege price fixing and resulting injury, plaintiff's complaint was properly dismissed.

Plaintiff's attempt (at 27-28) to characterize the decision of the court below as being founded upon a "target area" analysis is likewise misplaced. The parties argued the issue of standing in the Court of Appeals, but the point

was avoided in the decision. Nowhere in the orders of the Court of Appeals is there an indication that plaintiff lacked standing, therefore this argument is misplaced.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the petition for a writ of certiorari in this cause be denied.

Respectfully submitted,

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